

PGBR 2012/1 - Product Stewardship (Oil) Benefit: the meaning of the expression 'goods produced from used oil' and the terms 'filtered', 'de-watered', and 'de-mineralised' for the purposes of the Product stewardship for oil benefit scheme.

⚠ This cover sheet is provided for information only. It does not form part of *PGBR 2012/1 - Product Stewardship (Oil) Benefit: the meaning of the expression 'goods produced from used oil' and the terms 'filtered', 'de-watered', and 'de-mineralised' for the purposes of the Product stewardship for oil benefit scheme.*

⚠ This ruling is being reviewed as a result of a recent court/tribunal decision. Refer to Decision Impact Statement: [Cooper Bros Holdings Pty Ltd trading as Triple R Waste Management v Commissioner of Taxation \(2011/3815\)](#).

⚠ There is a Compendium for this document: **[PGBR 2012/1EC](#)** .

⚠ This document has changed over time. This is a consolidated version of the ruling which was published on *24 April 2013*



Product Grant and Benefit Ruling

Product Stewardship (Oil) Benefit: the meaning of the expression ‘goods produced from used oil’ and the terms ‘filtered’, ‘de-watered’, and ‘de-mineralised’ for the purposes of the Product stewardship for oil benefit scheme.

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What this Ruling is about

1. This Ruling provides the Commissioner's view regarding the meaning of the expression ‘goods produced from used oil’ and the terms ‘filtered’, ‘de-watered’, and ‘de-mineralised’ in the *Product Stewardship (Oil) Act 2000* (PSO Act) and the Product Stewardship (Oil) Regulations 2000 (PSO Regulations).

2. This Ruling also explains:
 - the context of the Product stewardship for oil benefit scheme (PSO scheme);¹
 - the meaning of 'recycled oil';
 - the meaning of 'oils'; and
 - the meaning of 'used oil'.
3. This Ruling specifically deals with items 5 and 6 of the table to subregulation 4(1) of the PSO Regulations. However, the Commissioner's views expressed in relation to items 5 and 6, where relevant, will have application to the PSO Scheme generally.²
4. In this Ruling, unless otherwise stated, all legislative references are to the PSO Act.

Background

5. The objects of the PSO scheme are to ensure the environmentally sustainable management, re-refining and re-use of used oil and to support economic recycling options for used oil.³
6. The PSO scheme is administered by the Commissioner.⁴ It is governed by a statutory framework encompassing the:
 - PSO Act and PSO Regulations;
 - *Product Grants and Benefits Administration Act 2000* (PGBAA) and Product Grants and Benefits Administration Regulations 2000;
 - *Excise Act 1901*;
 - *Excise Tariff Act 1921*; and
 - *Customs Tariff Act 1995*.
7. The PSO Act establishes the general framework of the PSO scheme and the entitlement to a product stewardship (oil) benefit (the benefit).⁵ Subregulation 4(1) of the PSO Regulations sets out the amount of benefit that applies to each category of recycled oil as follows:⁶

¹ Also referred to as the Product stewardship for oil benefit programme.

² For example, item 4 (Diesel extenders) of the PSO benefit table which refers to the terms, 'filtered, de-watered and de-mineralised'.

³ Section 3.

⁴ Section 7 of the PSO Act. See also section 7 of the PGBAA.

⁵ See item 2 of the table in section 8 of the PGBAA.

⁶ The benefit amounts set out in the table in paragraph 7 of this Ruling are current as at the date of publication of the Ruling and may be subject to change.

Item	Category	Amount (cents/l)
1	Re-refined base oil (for use as a lubricant or a hydraulic or transformer oil) that meets the criteria mentioned in Schedule 1	50
2	Other re-refined base oils	10
3	Diesel fuels that comply with the <i>Fuel Standard (Automotive Diesel) Determination 2001</i> , as in force from time to time	7
4	Diesel extenders:	5
	(a) that are filtered, de-watered and de-mineralised; and	
	(b) that, if combined with diesel fuels, would produce a combined fuel that complies with the Determination mentioned in item 3	
5	High grade industrial burning oils (filtered, de-watered and de-mineralised)	5
6	Low grade industrial burning oils (filtered and de-watered)	3
7	Industrial process oils and lubricants, including hydraulic and transformer oils (re-processed or filtered, but not re-refined)	0
8	Gazetted oil consumed in Australia for a gazetted use	5.449
9	Recycled oil mentioned in item 5 or 6 that has been blended with a petroleum product that meets the criteria mentioned in Schedule 2	9.557

8. The PGBAA and Product Grants and Benefits Administration Regulations 2000 set out the eligibility criteria for registration, the entitlement for the benefit and administrative mechanisms for the payment of benefits to recyclers of oil.

9. The *Excise Act 1901* provides for the administration of excise and for the licensing of manufacturers of excisable goods. The *Excise Tariff Act 1921* and *Customs Tariff Act 1995* provide for the product stewardship levy on petroleum based oils and greases (and their synthetic equivalents).⁷ The levy is in the form of an excise duty on domestically produced oils, greases and their synthetic equivalents; and a customs duty on similar imported oils, greases and their synthetic equivalents.

⁷ Examples of petroleum based oils are lubricants, transmission oils and hydraulic oils.

10. The benefit is an amount (expressed in cents per litre) that applies to a quantity of recycled oil. The benefit is paid to an oil recycler for the sale or consumption of recycled oil that they have recycled.

11. While there is no direct connection between the levy and the benefit,⁸ the payment of the levy ensures that some of the costs of used oil recycling are borne by the markets that gain the benefit from the production and use of that oil.⁹

12. Neither the PSO Act nor the PSO Regulations provide statutory meanings for the terms 'filtered', 'de-watered' and 'de-mineralised'. These terms are a description of the outcomes of the processes in producing high grade industrial burning oils and low grade industrial burning oils as set out in the table to subregulation 4(1) of the PSO Regulations.¹⁰

Product Stewardship (Oil) Benefit Scheme

13. You are entitled to a benefit for the sale or consumption of recycled oil that you have recycled in Australia.¹¹

14. You are not entitled to a benefit unless you are registered for benefits under the PGBAA.¹²

15. You must satisfy the general¹³ and specific¹⁴ requirements for registration under the PGBAA. The general requirements for registration are that you:

- satisfy any specific requirements for a benefit;
- satisfy any prescribed conditions; and
- hold an ABN or if you are not entitled to an ABN, you provide evidence of your identity and address as determined by the Commissioner.

16. You satisfy the specific registration requirements if the Commissioner is satisfied that you:

- are licensed to manufacture excisable goods under Part IV of the Excise Act,¹⁵ and

⁸ The exception being Item 8 of the PSO benefit table - gazetted oil consumed in Australia for a gazetted use.

⁹ Department of the Environment and Heritage December 2005, *Product Stewardship for Oil Programme Administrative Guidelines*, Department of the Environment and Heritage, Canberra.

¹⁰ See paragraph 7 of this Ruling for the table.

¹¹ Section 9. What it means to be 'in Australia' is not discussed in this Ruling.

¹² Section 8.

¹³ Subsection 9(2) of the PGBAA.

¹⁴ Subsection 9(3A) of the PGBAA.

¹⁵ The exception being where you are only entitled to a benefit for the consumption in Australia of a gazetted oil for a gazetted use – see paragraph 9(3A)(a) of the PGBAA.

- comply with relevant Commonwealth, State or Territory legislation relating to oil recycling operations or enterprises.¹⁶

17. You are not entitled to a benefit unless you make a claim for the payment of a benefit in respect of a claim period during which the entitlement arose. You must lodge your claim within three years after the start of the claim period.¹⁷ The Commissioner must make an assessment of the amount of benefit to which you are entitled in respect of the claim period.¹⁸

18. The benefit is claimable once only on a litre of recycled oil that is recycled – at the last point in the production chain when sold for use to the end user rather than further recycling production.¹⁹

Interpretation

19. In this Ruling, unless otherwise stated:

- a reference to:
 - 'benefit' is a reference to a product stewardship (oil) benefit under section 9 of the PSO Act;
 - 'Commissioner' is a reference to the Commissioner of Taxation;
 - 'excisable goods' is a reference to goods specified in the Schedule to the *Excise Tariff Act 1921* on which excise duty is imposed;²⁰
 - 'Excise Act' is a reference to the *Excise Act 1901*;
 - 'Excise Tariff Act' is a reference to the *Excise Tariff Act 1921*;
 - 'PSO scheme' is a reference to the Product stewardship for oil benefit scheme or the Product stewardship for oil benefit programme;
 - 'PSO benefit table' is a reference to the table contained in subregulation 4(1) of the Product Stewardship (Oil) Regulations 2000;
 - 'PSO Regulations' is a reference to the Product Stewardship (Oil) Regulations 2000; and
 - 'PGBAA' is a reference to the *Product Grants and Benefits Administration Act 2000*; and
- it is assumed that you:

¹⁶ Regulation 4B of the Product Grants and Benefits Administration Regulations 2000.

¹⁷ Section 15 of the PGBAA.

¹⁸ Section 17 of the PGBAA.

¹⁹ Subsection 10(3) of the PSO Act and paragraph 4(2)(b) of the PSO Regulations.

²⁰ See the definition of 'excisable goods' in subsection 4(1) of the Excise Act.

- have met the requirements for entitlement to a benefit under section 9 of the PSO Act;
- are registered for entitlement to a benefit under section 9 of the PGBAA;
- are licensed to manufacture excisable goods under Part IV of the Excise Act;²¹ and
- comply with relevant Commonwealth, State or Territory legislation relating to oil recycling operations or enterprises.²²

This Ruling applies to partnerships and unincorporated associations as if they were a person.²³

Class of person

20. This Ruling applies to the class of persons or entities that produce recycled oil by 'filtering' and 'de-watering' used oil pursuant to item 6 of the PSO benefit table; or by 'filtering', 'de-watering' and 'de-mineralising' used oil pursuant to item 5 of the PSO benefit table.

Ruling

Entitlement to a benefit

21. You are entitled to a benefit for the sale or consumption of recycled oil that you have recycled in Australia.²⁴

Meaning of 'recycled oil'

22. 'Recycled oil'²⁵ is defined as either goods produced from used oil or used oil that has been restored to its former state.²⁶

Meaning of 'oils'

23. 'Oils' are defined to be petroleum based oils or their synthetic equivalents or any other goods prescribed for the purposes of the definition of oil.²⁷

²¹ Paragraph 9(3A)(a) of the PGBAA.

²² Paragraph 9(3A)(b) of the PGBAA.

²³ See sections 51 and 52 of the PGBAA.

²⁴ Section 9. What it means to be 'in Australia' is not discussed in this Ruling.

²⁵ See subsection 6(1).

²⁶ This Ruling does not deal with the meaning of 'used oil that has been restored to its former state'. In the context of the PSO Scheme, restoring used oil to its former state would require used oil to be brought back to its original state as base oil. 'Base oil' is defined in regulation 3 of the PSO Regulations.

²⁷ At the time of publication of this Ruling no other goods were prescribed for the purposes of the definition of 'oils'.

24. Petroleum based oils are oils derived from the refining of crude oil (petroleum) and include lubricant base oils; hydraulic fluids; brake fluids; transmission oils; transformer and heat transfer oils and greases.²⁸

Meaning of 'used oil'

25. The term 'used oil'²⁹ is defined as follows:

Used oil means any oil that has been used and that, as a result of such use, is contaminated by physical or chemical impurities.

26. The Commissioner considers oil that is contaminated by physical or chemical impurities through its use as oil, and any subsequent contamination of this oil through storage or handling, remains 'used oil' for the purposes of the PSO Scheme.

Example 1: used oil

27. *The XYZ Trucking Company (XYZ) services its own vehicles. XYZ changes the engine oil in these vehicles every 10,000 kilometres.*

28. *As a consequence of its use, that is, as engine oil, the oil has been contaminated by physical or chemical impurities such as water and metal shavings. The oil drained out of the vehicles satisfies the description of 'used oil'.*

Example 2: used oil

29. *Following on from Example 1, XYZ stores the oil drained from its vehicles in a storage tank.*

30. *During its storage, the oil becomes further contaminated with water entering the tank through the vent pipe.*

31. *As the oil has been contaminated as a consequence of its actual use and subsequent storage, the oil remains 'used oil' for the purpose of the PSO scheme.*

Goods produced from used oil

32. The terms 'production' and 'produced' within the meaning of 'recycling of oils' or 'recycled oil' are not defined in the PSO Act or PSO Regulations.

33. Relevant to the meaning of 'recycled oil', the ordinary meaning of 'produce' includes 'manufacture'.³⁰

²⁸ Subsection 6(1).

²⁹ Subsection 6(1).

³⁰ *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

34. The Commissioner considers that for the purposes of the PSO Act the term 'produced' requires that the goods in question must emerge from a process as something new or different having a distinctive³¹ character or use.

35. The Commissioner considers that 'goods produced from used oil' are goods which are new or different having a distinctive character or use from the used oil as collected.

36. Where you produce recycled oil³² from used oil, the amount of benefit payable is determined by reference to the relevant description of the recycled oil in the 'Category' column of the PSO benefit table.³³ For example, 'Low grade industrial burning oils (filtered and de-watered)' is specified at item 6 in the PSO benefit table.

37. [Withdrawn.]

38. [Withdrawn.]

39. [Withdrawn.]

40. [Withdrawn.]

41. [Withdrawn.]

42. [Withdrawn.]

43. [Withdrawn.]

Example 4: goods not produced from used oil

44. *Rose is a waste oil collector and recycler. For her larger clients, Rose provides a 1,500 litre tank for the collection and accumulation of used oil.*

45. *To prevent physical contaminants (such as nuts, bolts and rags) from entering the storage tank, the tank has a coarse metal screen filter at the inlet. The purpose of this metal screen filter is to protect pumping equipment from damage when transferring the used oil from the tank to the road tanker.*

46. *As a result of the used oil's storage, some water (free water) in the used oil settles to the bottom of the storage tank.*

47. *Rose collects the used oil on a regular basis. Rose pumps the free water from the bottom of the tank into a compartment of her road tanker by use of a flexible spear. Once the transfer of free water is complete, the used oil is then transferred to a separate compartment on the road tanker.*

48. *Rose transports the used oil directly to a customer who uses the used oil as burner oil in a brick kiln.*

³¹ See paragraph 92 of this Ruling – distinctive means different.

³² See paragraphs 86 to 97 of this Ruling for an explanation of 'produce' in the context of 'goods produced from used oil'.

³³ Subsection 10(1) of the PSO Act and subregulation 4(1) of the PSO Regulations.

³⁴ [Withdrawn.]

49. *Rose's activities at her client's premises are part of the collection and transportation of used oils.*

50. *Rose has not produced 'recycled oil' from used oil as the coarse screening of the nuts and bolts and the removal of some free water does not result in something new or different having a distinctive character from the used oil as collected.*

'Filtered', 'de-watered' and 'de-mineralised'

51. The terms 'filtered', 'de-watered', and 'de-mineralised' are a description of the outcomes of actions or processes in the production of recycled oil, namely high grade industrial burning oils and low grade industrial burning oils as prescribed in the PSO benefit table. These terms are not defined in the PSO Act or PSO Regulations.

52. Low grade industrial burning oils are recycled oil produced by filtering and de-watering used oil while high grade industrial burning oils are produced by filtering, de-watering and de-mineralising used oil.

Filtered

53. The Commissioner considers that used oil has been 'filtered' if suspended impurities or solid contaminants (such as metal shavings or dirt) have been removed (fully or partially) from the used oil.

De-watered

54. The Commissioner considers that used oil is 'de-watered' if it has been subjected to a process that removes (fully or partially) the water present in the used oil.

55. [Withdrawn.]

56. [Withdrawn.]

57. [Withdrawn.]

58. [Withdrawn.]

59. [Withdrawn.]

60. [Withdrawn.]

61. [Withdrawn.]

De-mineralised

62. The Commissioner considers that used oil is 'de-mineralised' if it has been subjected to a process that removes (fully or partially) soluble and insoluble metal elements; and inorganic materials and minerals (such as salts and additives) in the used oil.

Example 6: goods produced from used oil – high grade industrial burning oils (filtered, de-watered and de-mineralised)

63. Further to Example 5, Gianni successfully tenders for the supply of high grade industrial burning oil.
64. To produce the high grade industrial burning oil, Gianni is required to further treat the previously filtered and de-watered oil. To remove certain soluble and insoluble metals and inorganic materials and minerals from the used oil, the used oil needs to be de-mineralised.
65. Gianni adds a quantity of sulphuric acid and a chemical surface-active reagent, called a surfactant. This causes the oil to separate into two phases, that is, oil and water-based or aqueous. The reagent causes soluble metals and other contaminants to accumulate in the aqueous phase and settle to the bottom of the tank where they are drained off as slurry.
66. The oil then undergoes centrifugal separation to remove any remaining fine particles suspended in the oil.
67. Gianni samples and tests the oil to ensure the oil meets his customer's specifications for high grade industrial burning oil.
68. The high grade industrial burning oil produced by Gianni is 'recycled oil' that is new or different having a distinctive character from the used oil as collected. The 'recycled oil' is 'goods produced from used oil'.
69. Gianni is entitled to a category 5 benefit as the recycled oil meets the description of high grade industrial burning oil. That is, as a consequence of the used oil being filtered, de-watered and de-mineralised.

Date of effect

70. This Ruling applies both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Entitlement to a benefit

71. You are entitled to a benefit for the sale or consumption of recycled oil that you have recycled in Australia.³⁵

72. To be entitled to claim a benefit, you must:

- be registered;
- hold a licence to manufacture excisable goods under Part IV of the Excise Act; and
- comply with any Commonwealth, State or Territory legislation relating to oil recycling operations.³⁶

Meaning of 'recycled oil'

73. The terms 'recycled oil' or 'recycling of oils' are defined in subsection 6(1) as:

recycled oil means:

- (a) goods produced from used oil; or
- (b) used oil that has been restored to its former state.³⁷

recycling of oils means:

- (a) the production of goods from used oils; or
- (b) the restoring of used oils to their former state.³⁸

74. The Commissioner considers the term 'recycled oil' describes the type of recycled oils; whereas the term 'recycling of oils' is a reference to the process or processes that results in a recycled oil.

³⁵ Section 9. What it means to be 'in Australia' is not discussed in this Ruling.

³⁶ Section 9 of the PGBAA.

³⁷ Subsection 6(1) of the PSO Act. This Ruling does not deal with the meaning of 'used oil that has been restored to its former state'. In the context of the PSO Scheme, restoring used oil to its former state would require used oil to be brought back to its original state as base oil. 'Base oil' is defined in regulation 3 of the PSO Regulations.

³⁸ Subsection 6(1).

Meaning of 'oils'

75. The term 'oils' is defined in subsection 6(1) as follows:

oils: the following are oils:

- (a) petroleum based oils (including lubricant base oils; prepared lubricant additives containing carrier oils; lubricants for engines, gear sets, pumps and bearings; greases; hydraulic fluids; brake fluids; transmission oils; and transformer and heat transfer oils);
- (b) synthetic equivalents of goods covered by paragraph (a);
- (c) any other goods prescribed for the purposes of this definition.³⁹

76. The Commissioner considers petroleum based oil does not include an oil derived from plant or animal matter, for example a vegetable oil. Petroleum based oil is oil derived from the refining of crude oil (petroleum).

77. The expression 'synthetic equivalents of goods covered by paragraph (a)' of the definition of 'oils' is a reference to lubricants, oils and greases consisting of chemical compounds that are artificially made (synthesized) from compounds other than crude oil (petroleum) or are manufactured using chemically modified petroleum components.

78. Lubricants, oils and greases are said to be synthetic if they are manufactured (generally by a chemical reaction process at a chemical plant) as opposed to petroleum based oils derived from the refining of petroleum.

79. Synthetic lubricants, oils and greases (synthetics) are typically long chain hydrocarbon, polyalphaolefin, polyalkylene glycol, dibasic acid ester or polyol ester compounds.

80. Synthetics are equivalent to petroleum based oils if they are engineered to perform the same function as conventional petroleum based oils. Synthetics are substitutes for petroleum based oils.

81. Synthetics are sometimes mixed with conventional petroleum based oils to produce a cost-effective product which is referred to as a 'semi' or 'part-synthetic' oil or grease.

Meaning of 'used oil'

82. Subsection 6(1) defines 'used oil' to be:

any oil that has been used and that, as a result of such use, is contaminated by physical or chemical impurities.

³⁹ At the date of publication of this Ruling, no goods were prescribed for the purposes of the definition of 'oils'. However, this may be subject to change.

83. The Commissioner considers that any oil⁴⁰ that is employed for a use as oil, and as a result of that use, is contaminated by physical or chemical impurities is 'used oil' for the purposes of the PSO Act.

84. Physical impurities may include (but are not limited to) metal shavings and dirt. Chemical impurities may include (but are not limited to) metal elements, solvents, glycol and water.

85. Used oil that subsequently becomes further contaminated through its storage or handling is 'used oil' for the purposes of the PSO Scheme. For instance, motor oil that has been used in a vehicle and subsequently becomes contaminated with foreign material (such as bolts, nuts and washers) or other impurities (such as water or glycol) during its collection, handling or storage remains 'used oil'.

Goods produced from used oil

86. The terms 'production' and 'produced' in the definitions of 'recycling of oils' or 'recycled oil' (respectively) are not defined by the PSO Act or PSO Regulations.

'Production' or 'Produced'

87. The *Macquarie Dictionary*⁴¹ defines 'production' and 'produced' respectively as follows:

Production

noun

1. the act of producing; creation; manufacture.
2. that which is produced; a product.
3. *Economics* the creation of value; the producing of articles having an exchangeable value.
4. the total amount produced.

Produced

verb (t)

to bring into existence; give rise to; cause: *to produce steam.*

3. *Economics* to create (something having an exchangeable value).
4. to bring forth; bear; give birth to.
5. to yield; provide, furnish, or supply: *a mine producing silver.*
10. to bring forth or yield offspring, products, etc.
11. *Economics* to create value; bring crops, goods, etc., into a state in which they will command a price.

⁴⁰ See the definition of 'oils' in subsection 6(1).

⁴¹ *The Macquarie Dictionary*, [Multimedia], version 5.0.0, 1/10/01.

noun

12. that which is produced; yield; product.

13. agricultural or natural products collectively.

88. The *Australian Oxford Dictionary*⁴² defines 'produce' as:

2 manufacture (goods) from raw materials etc.

3 bear or yield (offspring, fruit, a harvest etc).

4 bring into existence.

89. Relevant to the meaning of 'recycled oil', the ordinary meaning of 'produce' includes 'manufacture'.

90. In *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation*⁴³ (*Caltex*) the Federal Court was required to consider the phrase 'manufactured or produced' for the purposes of the Excise Tariff Act. Sundberg J cited with approval the judgement of Lockhart J in *Commissioner of Taxation v. Jax Tyres Pty Ltd*⁴⁴ (*Jax Tyres*) in the context of sales tax legislation:

To manufacture an article necessarily involves producing a different article from the articles, materials or ingredients from which it was made. As Darling J. said in *McNicol v. Pinch* (1906) 2 K.B. 352 at p. 361:

'I think the essence of making or of manufacturing is that what is made shall be a different thing from that out of which it is made.'

That passage was approved and applied by Dixon J. in *Federal Commissioner of Taxation v Jack Zinader Pty Ltd* (1949) 78 CLR 336 – the leading case in this field. Whether the article which results from the process of manufacturing is a different article from the constituents or ingredients from which it was made is a question of fact: the *Jack Zinader* case.

'Production',...is a word of wide import; but it still involves the element of producing something different from the materials from which it was made. It is not possible to formulate precise definitions of such general terms as 'manufacture' and 'production'; but they do not bear a restricted meaning. Whatever answers the description of 'manufacture' or 'production' of goods according to accepted usage of the English language is within the Act.⁴⁵
[Emphasis added]

⁴² *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

⁴³ *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951; [2008] FCA 1951.

⁴⁴ *Commissioner of Taxation v. Jax Tyres Pty Ltd* (1984) 5 FCR 257; (1984) 16 ATR 97; 85 ATC 4001.

⁴⁵ *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951 at paragraph 65.

91. In *Caltex*, Sundberg J, in relying on *Jax Tyres*,⁴⁶ held that for the purposes of section 5 of the Excise Tariff Act, goods are manufactured or produced if they have emerged from a process as a 'new and different article ... having a distinctive character or use'.⁴⁷

92. Whilst the above decisions are in a different legislative context, the Commissioner considers that the courts' reasoning equally applies and the same meaning should be attributed to the terms 'produce' or 'production' for the purposes of the PSO Act.

93. It follows that the term 'produced' requires that the goods in question must emerge from a process as a new or different article having a distinctive character or use. The ordinary meaning of 'distinctive' means 'distinguishing; serving to distinguish' and the ordinary meaning of 'distinguish' means 'different'.⁴⁸ In particular circumstances the difference in character may be slight or it may be great.

94. In determining whether you have 'goods produced from used oil' it is necessary for the goods to be new or different having a distinctive character or use from the used oil as collected.

95. Some factors to be taken into consideration in determining whether a thing is different from that out of which it was made were discussed in the High Court by Windeyer J in *M.P. Metals Pty Ltd v. Federal Commissioner of Taxation*:⁴⁹

...Identity and difference, as concepts, must always be related to some quality of the thing or things in respect of which identity or difference is to be determined. It may be colour, shape, chemical composition or any other quality. To speak of 'substantial differences', as distinct from small differences, means little or nothing, unless some quality of the thing is postulated as its essential.

96. It will be a question of fact and degree in relation to which an exercise in judgement is involved as to whether the end product constitutes something new or a different thing having a distinctive character or use. This involves a process of evaluating and weighing a range of factors for the particular circumstance.

⁴⁶ *Commissioner of Taxation v. Jax Tyres Pty Ltd* (1984) 5 FCR 257 at 264.

⁴⁷ *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951 at paragraph 71.

⁴⁸ *The Macquarie Dictionary* [Multimedia], version 5.0.0, 1/10/01.

⁴⁹ *M.P. Metals Pty Ltd v. Federal Commissioner of Taxation* (1967) 117 CLR 631; (1967) 14 ATD 407. This case discussed a provision of the *Income Tax and Social Services Contribution Assessment Act 1936-1965* (Cth).

97. In determining, whether the recycled oil is something new or different having a distinctive character or use from the used oil, the Commissioner will have regard to the following factors:

- changes in physical or chemical properties (for example, ash content, water by distillation or gross calorific value);
- type of used oil being processed (for example transformer oil, used engine oils or commingled used oils); and
- extent to which used oil has been filtered, de-watered or de-mineralised.

The relevance and weighting afforded to the above factors⁵⁰ will vary according to the facts of the individual case.

98. Where you produce recycled oil from used oil the amount of benefit payable is determined by reference to the relevant description of the recycled oil in the 'Category' column of the PSO benefit table.⁵¹ For example, 'Low grade industrial burning oils (filtered and de-watered)' is specified at item 6 in the PSO benefit table.

The PSO scheme is not intended to apply to collectors

99. The Explanatory Memorandum to the Product Stewardship (Oil) Bill 2000 explains the impact of the PSO scheme on waste oil collectors:

Impact on Waste Oil Collectors

Although it is not intended that collectors will be direct recipients of a levy, or directly participate in any trading of certificates, they should nevertheless benefit from the product stewardship system proposed. The increased value given to waste oil through the product stewardship system levy will flow, virtually immediately, to approved recyclers. This should have the effect of improving the operating margins of recyclers, and causing them to require greater quantities of oil. With recyclers competitively seeking more oil, the collectors in turn should be better placed commercially to achieve better margins on existing quantities, or go further afield in search of new sources of waste oil.⁵²

100. The Commissioner considers the PSO scheme is not intended to directly benefit collectors of used oil (that is, through the payment of a benefit).

⁵⁰ This is not an exhaustive list.

⁵¹ Subsection 10(1) of the PSO Act and subregulation 4(1) of the PSO Regulations.

⁵² See page 32 of the Explanatory Memorandum to the Product Stewardship (Oil) Bill 2000.

101. Notwithstanding the PSO scheme is a beneficial scheme designed to encourage the recycling of oils, the Commissioner considers that not all filtering and de-watering processes may result in the production of recycled oil that is new or different having a different character or use from the used oil as collected.

102. A waste oil collector's activities are to facilitate the collection and transportation of used oil to recycling facilities or other premises and therefore are not for the purposes of producing recycled oil.

103. The Commissioner considers that the following initial processes⁵³ performed by a waste oil collector do not constitute the production of recycled oil:

- the coarse filtering to screen out solid objects such as nuts, washers and bolts from used oil as it is pumped into a truck's collection tank;
- the removal of water (de-watering) due to settling in a truck's collection tank as part of the collection of used oil; or
- de-watering due to settling of used oil in a tank or other receptacle at workshops, industrial premises or other places where it has been accumulated before being pumped into a truck's collection tank.

However, the extent to which used oil is filtered and de-watered by a waste oil collector to produce something new or different having a distinctive character or use from the used oil as collected is a question of fact and degree with each case decided on its merits.

104. Where a waste oil collector does not produce recycled oil there is no requirement for the collector to be licensed to manufacture excisable goods under Part IV of the Excise Act or registered for the purposes of the PSO scheme.

'Filtered', 'de-watered' and 'de-mineralised'

105. The terms 'filtered', 'de-watered', and 'de-mineralised' are a description of the outcomes of actions or processes in the production of recycled oil, namely high grade industrial burning oils and low grade industrial burning oils as prescribed in the PSO benefit table.⁵⁴ These terms are not defined in the PSO Act or PSO Regulations.

⁵³ In *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951, Sundberg J explained at 71 that the principal objectives of a commercial operation may be relevant to the question of characterisation as they provide context for the task of characterisation and are an important factor to take into account. However, they are not determinative in ascertaining whether a good is manufactured or produced.

⁵⁴ See the PSO benefit table provided at paragraph 7 of this Ruling.

106. Low grade industrial burning oils (filtered and de-watered) or high grade industrial burning oils (filtered, de-watered and de-mineralised) require a combination of 2 or 3 processes respectively.

107. Low grade industrial burning oils are more likely to contain undesirable contaminants that can be burnt in appropriate applications. Low grade industrial burning oils can be used as a fuel in brickwork, cement and lime kilns.

108. The higher benefit paid for 'High grade industrial burning oils'⁵⁵ reflects the higher level of recycling performed (that is, the requirement for the oil to also be de-mineralised) and the consequent lower level of contaminants associated with the product. High grade industrial burning oils can be used in industrial and marine applications requiring a cleaner burner fuel.

Filtered

109. The Macquarie Dictionary⁵⁶ defines 'filter' as follows:

noun

1. any device in which cloth, paper, porous porcelain, or a layer of charcoal or sand, is held and through which liquid is passed to remove suspended impurities or to recover solids.

verb (t)

6. to remove by the action of a filter.
7. to act as a filter for.
8. to cause to pass through, or as through, a filter.

verb (i)

9. to percolate; pass through or as through a filter.

110. The following filters are typically used by the oil recycling industry:⁵⁷

- bag filters;
- screen filters;
- filter pads;
- bentonite clay filter;
- activated clay filter; and
- centrifugal separators.

111. The removal of suspended impurities or solid contaminants from used oil is typically achieved by passing used oil through a filter or series of filters.

⁵⁵ See item 5 of the PSO benefit table at paragraph 7 of this Ruling.

⁵⁶ *The Macquarie Dictionary*, [Multimedia], version 5.0.0, 1/10/01.

⁵⁷ This is not an exhaustive list.

112. The effectiveness of the filter depends on the size and type of filter being utilised relative to the contaminants present in the used oil. For example, a 400 micron⁵⁸ bag filter is not designed to remove (that is, filter out) contaminants with a particle size measuring 350 microns.

113. The Commissioner considers that used oil has been 'filtered' if suspended impurities or solid contaminants have been removed (fully or partially) from the used oil.

114. While the coarse screening of nuts, bolts, rags and other foreign material which have become mixed in with used oil (usually the result of handling or storage) may be seen as a form of filtering; the type and extent of this filtering will not ordinarily produce something new or different having a distinctive character or use from the used oil as collected.

De-watered

115. To understand the meaning of the term 'de-watered' in the context of used oil recycling, it is necessary to understand how water co-exists with oil.

116. Water can exist in oil in three states or phases being dissolved water, emulsified water and free water.

117. Dissolved water refers to individual water molecules dispersed throughout the oil. Dissolved water in oil is a function of its environment – the relative humidity, temperature and type of oil determines the content of dissolved water in oil.

118. Emulsified water is a reference to water that has been mixed and homogenised in oil to form an emulsion. Emulsion can occur when the amount of water in the oil has exceeded the maximum level for it to remain dissolved. At this point, water is suspended in the oil in microscopic droplets. When this happens in lubricating oils, the oil is said to be cloudy or hazy.

119. Free water is water that is free to separate and settle to the base of a reservoir or storage tank.

120. The meaning of 'de-watering' has been described as:

Water is found in used oil as free water or bound water, for example in emulsions. The term dewatering (sic) is usually taken to mean the removal of free water. Where water has been emulsified with oil, the emulsion has to be 'broken' with a de-emulsifier before the water can be separated from the oil.

⁵⁸ 1 micron equals 0.001 millimetres or 1000 microns equals 1 millimetre.

Dewatering (sic) is a simple process relying on the separation of aqueous and oil phases over time under the influence of gravity. The used oil is allowed to stand in a tank (raw waste oil) and free water drops to the bottom where it can be drained, treated (waste water treatment) and discharged appropriately to sewer or stormwater depending on quality and local regulations.⁵⁹

121. The following de-watering methods are typically used by the oil recycling industry:

- gravity settling;
- application of heat;
- centrifuge;
- de-emulsifiers (application of chemicals); and
- flash evaporation.⁶⁰

122. Gravity settling does not remove emulsified water. The removal of emulsified water in used oil requires further processing of the oil than simply gravity settling as the emulsion must be 'broken apart' for water to separate from the oil. Common methods used by the oil recycling industry to remove emulsified water include the application of heat and the use of de-emulsifiers.

123. De-watering results in the separation of oil and water. The 'oily water' by-product is then treated and disposed of in accordance with local and state/territory requirements.

124. For the purposes of the PSO scheme de-watering entails the removal (fully or partially) of free water, dissolved water or emulsified water or any combination of these states.

125. The extent to which used oil is de-watered is ultimately determined by the type and quality of recycled oil being produced.

126. The Commissioner considers that used oil is de-watered if it has been subjected to a process that removes (fully or partially) the water present in the used oil.

De-mineralised

127. In the context of used oil recycling, it is appropriate to have regard to the generally accepted meaning of 'de-mineralised' within the oil recycling industry.

128. Filtering and de-mineralisation in the context of the PSO Scheme have been described as:

The purpose of filtering and demineralisation (sic) is to remove inorganic materials and certain additives from used oil to produce a cleaner burner fuel or feed for re-refining.⁶¹

⁵⁹ Department of Sustainability, Environment, Water, Population and Communities, viewed 23 July 2012, www.oilrecycling.gov.au/what-happens.html.

⁶⁰ This is not an exhaustive list.

129. An independent review of the PSO scheme considered (after consultation with the oil recycling industry) that:

Demineralisation (sic) is a process involving removal of metals and other inorganics from the used oil, with a mild form of sulphuric acid treatment. An acidic sludge is produced as a waste stream and this must be treated and disposed of in an appropriate manner.⁶²

130. Soluble and insoluble metal elements and other inorganic materials and minerals (such as salts and additives) may be present in the used oil (depending on the type or mixture of the used oil) as a consequence of its use. Used oil may contain metals such as arsenic, antimony, calcium, chromium, copper, lead, mercury, potassium, sodium, sulphur and vanadium. This is not an exhaustive list and it is recognised that used oil may contain other metals and compounds.

131. The effectiveness of de-mineralisation is dependent on the type and quality of the used oil being processed and the level of treatment applied.

132. A typical process of de-mineralisation involves the use of a chemical surface-active reagent known as a surfactant. The surfactant causes the used oil to break into two phases, being oil and water-based or aqueous. The surfactant causes the contaminants in the used oil to accumulate in the aqueous phase, which settle to the bottom of a tank as a slurry. The slurry contains metals and some of the oil additives. The slurry is then drained off, dried and disposed of appropriately.

133. De-mineralisation results in a 'de-mineralised' oil and a by-product containing contaminants (such as metals and certain additives) which is then disposed of in accordance with local and state/territory requirements.

134. The Commissioner recognises that the use of chemical surface-active reagents is only one method of de-mineralising used oils and that other methods can be used to remove soluble and insoluble metals, inorganic materials and oil additives.⁶³

135. The Commissioner considers that used oil is de-mineralised if it has been subjected to a process that removes (fully or partially) soluble and insoluble metals, inorganic materials and minerals (such as salts and additives) in the used oil.

⁶¹ Department of Sustainability, Environment, Water, Population and Communities, viewed 23 July 2012, www.oilrecycling.gov.au/what-happens.html.

⁶² See page 47 of the Australian Academy of Technological Sciences and Engineering, *Independent Review of the Transitional Assistance Element of the Product Stewardship for Oil (PSO) Programme* (March 2004).

⁶³ Oils may contain from 2% to 5% additives. Additives (for example, antioxidants, wear protection additives and de-foamants) extend the life of the oil and enhance its performance.

136. The removal of solid metals and non-metallic contaminants solely by filtering is not de-mineralisation for the purposes of the PSO Regulations – de-mineralisation requires the removal of contaminants that cannot be filtered out. The purpose of de-mineralisation is to produce a cleaner burner fuel or feed oil for refining and as such requires used oil to be treated beyond the filtering and de-watering necessary to produce low grade industrial burning oils.

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